

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

AMERICAN FEDERATION OF STATE,  
COUNTY, AND MUNICIPAL EMPLOYEES,  
COUNCIL 81, LOCAL 2004

Petitioner/Appellant,

v.

STATE OF DELAWARE,  
DEPARTMENT OF SERVICES FOR  
CHILDREN, YOUTH AND THEIR  
FAMILIES, and DELAWARE PUBLIC  
EMPLOYMENT RELATIONS BOARD,

Respondent/Appellees.

Civil Action No. 14869

MEMORANDUM OPINION

Date Submitted: June 3, 1996

Date Decided: July 29, 1996

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Delaware; Attorneys for Petitioner/Appellant

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Wilmington Delaware; Attorneys for the Respondents/Appellees

JACOBS, VICE CHANCELLOR

Pending before this Court is an appeal, brought pursuant to 19 Del. C. § 1309, from an order by the Public Employment Relations Board (the "PERB"). The PERB order dismissed, for lack of jurisdiction, a complaint by the Appellant, American Federation of State, County and Municipal Employees, Council 81, Local 2004 (the "Union"), against the Appellee, State of Delaware, Department of Services for Children, Youth and Their Families, (the "Department"). For the reasons stated below, that ruling will be affirmed.

### I. FACTS

In August 1994, the Department announced a workforce transition at the Ferris School, a juvenile rehabilitation facility, in which 39 new positions, designated as "Treatment Specialists," were created. To create these new positions, the Department reclassified certain existing positions, including those that were classified as Youth Rehabilitation Counselor II ("YRC II"). To enable YRC II employees to qualify for the Treatment Specialist positions, the Department instituted a special educational program (the "education program"). Under that program, YRC II employees having 55 or more college credits would be entitled to complete their college education, at Department expense, to satisfy the college degree requirement for the Treatment Specialist position. YRC II Counselors who qualified for the

education program would work the less demanding night shift, and were reclassified as Youth Rehabilitation Counselor III ("YRC III").

A major problem was that many YRC II counselors did not qualify for the education program because they lacked the required 55 college credits. The most senior YRC II counselors who did not qualify were required to work the two day shifts at the Ferris School; the junior YRC II counselors who did not qualify were relegated to the night shift, and were informed that they would be laid off by the end of the year.

On November 22, 1994, several YRC II employees filed a grievance claiming that they were entitled to retain their positions until they had secured the necessary college credits to qualify for the education program and become Treatment Specialists. That grievance was denied on March 29, 1995 by the Deputy Director of Labor Relations, and was not appealed. The Department regarded that decision (the "Bassett decision") as a definitive ruling that employees who did not meet the college credit requirement were not entitled to the education program benefits or, as a consequence, to the Treatment Specialist positions.

Among the YRC II counselors who wanted to become Treatment Specialists but did not have the required 55 hours of college credit were Thea

Scott and John Hector. On March 1, 1995, Scott and Hector filed grievances in which they claimed that by establishing the 55 college credit requirement for the Treatment Specialist positions, the Department violated the State Merit Rules and its collective bargaining agreement with the Union. The Scott and Hector grievances were filed after the Department had begun to implement the reclassification plan and to lay off non-qualifying employees.

The parties pursued their grievance through "Step 4" of the grievance process, as outlined in Article 7 of the Collective Bargaining Agreement (the "CBA"). Grievances arising out of violations of the CBA and the Merit Rules System are processed through the CBA's grievance procedure, including a "Step 4" hearing. The Deputy Director of Labor Relations, or his or her designee, presides over and decides a Step 4 hearing. In this case Mr. Ralph Head, the Deputy Director's designee, presided over Scott and Hector's Step 4 hearing on May 19, 1995.

On June 30, 1995, Mr. Head issued his decision (the "Head decision"), concluding that (i) although the Department had the legal authority to reclassify the positions, the reclassification did not change any of the position's job duties; (ii) the Department's determination of those persons eligible for the education program, based on the number of college credit

hours the individual had already obtained, unfairly denied the grievants, as a separate class, the opportunity to benefit from the education program; and (iii) the Department was required to grant Scott and Hector an opportunity to participate in the education program.

The Head decision, which did not address the earlier Bassett decision, was consistent with Bassett insofar as it found that the Department was entitled to reclassify the YRC II positions. However, Head was inconsistent with Bassett insofar as it rejected Bassett's ruling that the grievants were not entitled to participate in the education program.

The Department did not take any steps to implement the Head decision. On July 19, 1995, the Union, as the exclusive bargaining representative for the YRC employees, filed an unfair labor practice charge with the PERB, claiming that by failing to implement the Head decision, the Department had violated 19 Del. C. §§ 1307(a)(1) and 1307(a)(5) as to Scott and Hector.<sup>1</sup> More specifically, the Union claimed that the Department had unilaterally changed a mandatory bargaining term which, the Union contended, was a per se breach of the duty to bargain in good faith and, accordingly, reviewable by the PERB.

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<sup>1</sup>The alleged violation of 19 Del. C. § 1307 (a)(1) was dismissed by agreement of the parties, leaving only the claim under §1307(a)(5).

After conducting a hearing both on the questions of jurisdiction and the merits of the complaint, the Executive Director of the PERB dismissed the complaint for lack of jurisdiction. On appeal, the full PERB affirmed the Executive Director's decision. The Union has appealed that jurisdictional ruling to this Court.

## II. DECISION

### A. The Parties' Contentions

The Union contends that the PERB erroneously concluded that it lacked jurisdiction to hear the unfair labor practice claim. The Union argues that (i) the grievance procedure set forth in the CBA is a mandatory subject of bargaining, (ii) the Department's failure to implement the Head decision constituted a unilateral change in the CBA, and (iii) therefore, the Department's failure is a per se unfair labor practice subject to PERB's jurisdiction.

The Department responds that the PERB properly declined jurisdiction over the classification issue raised in the Hector and Scott grievances, because that subject matter was specifically made not a mandatory subject of collective bargaining and therefore falls outside the PERB's jurisdiction. Rather, because the grievance alleges a Merit Rule violation, it falls properly within

the exclusive jurisdiction of the Merit Employee Relations Board ("MERB").<sup>2</sup>

Having considered these arguments, I conclude that the Department's position is the correct one.

B. Standard of Review and  
Question Presented

Because the jurisdictional issue is purely legal, this Court, in exercising its appellate powers, will review and determine that question de novo. See Red Clay Education Association v. Board of Education of Red Clay Consolidated School District, Del. Ch., C.A. No. 11958, Chandler, V.C., Mem. Op. at 6 (Jan. 16, 1992). In carrying out that function, the Court is "not unmindful that the agency whose decision is being reviewed is an expert one functioning in an area that requires or at least is greatly aided by such expertise." Id. (quoting Seaford Board of Education and Seaford School District v. Seaford Education Association, Del. Ch., C.A. No. 9491, Allen, C., Mem. Op. at 2 (Feb. 5, 1988)(citations omitted)).

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<sup>2</sup>Presumably out of an abundance of caution, the grievants also filed a proceeding before the MERB.



The Union contends that the PERB has jurisdiction because the Department committed an unfair labor practice by violating 19 Del. C. § 1307(a)(5). That statute provides:

- (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following...
  - (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject. (emphasis added)

The question presented here is whether the subject of this action - the Department's failure to follow the ruling in the Head decision concerning the effect of job reclassification - implicates a "discretionary" subject of bargaining within the meaning of § 1307(a)(5). If (as the Department claims) that subject is discretionary, then the PERB does not have jurisdiction.

1. The Discretionary Character  
of the Matter at Issue

Both the Union and the Department are covered under 19 Del. C. Chapter 13, the Public Employment Relations Act ("PERA"). Section 1301 of PERA obligates public employers and public employee organizations to enter into collective bargaining, and grants the PERB authority over disputes arising out of such bargaining. The grievance process is a mandatory subject of bargaining under 19 Del. C. § 1302(q). It is also undisputed that a



unilateral change in a mandatory term of bargaining would be a violation of 19 Del. C. § 1307(a)(5), over which the PERB would have jurisdiction.

However, the PERB's jurisdiction does not embrace all matters that may affect the public sector employment relationship. By statute, matters that are covered by the Merit Rules System pursuant to 29 Del. C. § 5938(c), are "discretionary." 19 Del. C. § 1302 (g).<sup>3</sup> Where there is uncertainty as to areas where the General Assembly intended to deny collective bargaining and instead to provide coverage under the merit system, the Court will resolve any doubt in favor of the Merit System and, as a necessary consequence, the conclusion that the subject matter at issue is discretionary. See Laborers' Local 1029 v. State, Del. Ch., 310 A.2d 664, 667 (1973), aff'd, Del. Supr., 314 A.2d 919 (1974).

In this case, no judicial construction is required, because the General Assembly has expressly determined that the subject matter of this grievance, job classification, falls within the MERB's — and, hence, outside the PERB's — jurisdiction. 29 Del. C. § 5938(c) states:

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<sup>3</sup>19 Del. C. § 1302(g) states:

"Discretionary subject" means, for the State as an employer only, any subject covered by merit rules which apply pursuant to § 5938(c) of Title 29, and which merit rules have been waived by statute.

The rules adopted or amended by the [MERB] under the following sections shall apply to any employee in the classified service represented by an exclusive bargaining representative or covered by a collective bargaining agreement under Chapter 13 of Title 19: Sections 5915 through 5921, 5933, 5935, and 5937 of this title.

29 Del. C. § 5915 provides that job classification is a matter covered under the Merit Rules System. Thus, under 19 Del. C. §1302(g) that subject is a discretionary subject of bargaining.

The Scott and Hector grievances were initially brought as claims based on contract and Merit Rule violations. The contract claims were later dropped, leaving only the claims alleging violations of the State Merit Rules System.<sup>4</sup> Those claims challenge the reclassification of the YRC II positions and the accompanying limitations upon the right of access to the education program. Because classification is not a statutorily mandated subject of bargaining, the Scott and Hector grievances fall outside the scope of the PERB's jurisdiction.

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<sup>4</sup>For that reason the Union's reliance on Appoquinimink Education Association v. Board of Education, Del. PERB, ULP 1-3-84-3-2A, (1984) and Indian River Education Association v. Board of Education, Del. PERB, ULP 90-09-053 (1991) is misplaced. Those decisions found an unfair labor practice violation pursuant to 19 Del. C. § 1307(5) based on contract term violations rather than Merit Rules System violations. Claimed violations of the contract terms of the CBA would properly fall within the scope of the PERB's jurisdiction.

## 2. The MERB Has Jurisdiction Over Merit Rule Grievances

The Union responds by attempting to make the grievance process itself, rather than the subject matter of the grievance, the focus of the Court's jurisdictional inquiry. Even if that process were the focus, the result would be the same. State Merit Rule 20.0210 provides that if the subject matter of the grievance falls under 29 Del. C. 5938 (as is the case here), the grievance will proceed in accordance with Rules 20.0000 and 21.0000. Chapter 20 covers the Merit Rule System grievance process. Rule 20.0340 of that Chapter provides that a Step 4 proceeding involving a Merit Rules violation is appealable to the State Personnel Director, and ultimately, to the MERB. Accordingly, even if the grievance process were the focus of this Court's inquiry, the PERB would still lack jurisdiction over this grievance, because MERB retains exclusive jurisdiction over matters involving the interpretation and implementation of the Merit Rules. See 29 Del. C. § 5914.<sup>5</sup>

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<sup>5</sup>The MERB's statutory authority over alleged Merit Rules violations is acknowledged in the CBA. Article 7, Grievance Procedure, of the CBA prescribes a distinct procedure for processing grievances over alleged violations of the Merit Rules. Article 7, Sections 7.1 and 7.8 state:

- 7.1 A grievance is defined as a dispute limited to the application or interpretation of this Agreement, except that complaints which allege a violation of the State Merit Rules may be processed under this procedure through Step 4...

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For purposes of 19 Del. C. § 1307(a)(5), the grievance underlying the Union's complaint is a discretionary subject that falls exclusively under the MERB's, rather than the PERB's, jurisdiction. Therefore, the PERB's dismissal of this action for lack of jurisdiction is affirmed. IT IS SO ORDERED.

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- 7.8 If the grievance involves a subject governed by the Merit Rules and is appealed, it shall be appealed to the State Personnel Director and then the State Personnel Commission [MERB] pursuant to Merit Rule 20.034.